

No. 04-1917

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

KATHERINE FLOWERS,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CORRECTED BRIEF OF THE UNITED STATES AS APPELLANT
AND REQUIRED APPENDIX

Honorable J. Phil Gilbert
United States District Court Judge

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FILED UNDER SEAL

JURISDICTIONAL STATEMENT

The district court had jurisdiction over a motion to expunge records relating to defendant's conviction in that court. See *United States v. Janik*, 10 F.3d 470, 472 (7th Cir. 1993). On January 16, 2004, the district court, without hearing from the government, granted in part and denied in part defendant's motion to expunge. (App. 15-17)¹. On February 5, 2004, the United States filed a motion for a stay and requested that the district court reconsider its order. (App. 18-19). On March 9, 2004, the district court denied the government's motion. (App. 20). On April 6, 2004, the United States filed a timely notice of appeal. This Court has jurisdiction

¹ "App. ____" refers to the Appendix attached to the brief and the corresponding page number.

over this appeal under 28 U.S.C. 1291. *Janik*, 10 F.3d at 470-472.

ISSUE PRESENTED

Whether the district court erred in ordering that judicial records relating to defendant's conviction be expunged.

STATEMENT OF THE FACTS AND CASE

On March 25, 1996, defendant, Katherine Flowers, pled guilty to a one-count information charging her with a violation of 42 U.S.C. 3631(b)(1), for interfering with housing rights on account of race. As part of her plea agreement, she stipulated that on October 29, 1994, she drove her two co-defendants to and from the victim's home, where her co-defendants, while wearing white sheets and a hood, burned a cross to intimidate a white woman so that she would stop associating with an African American man. (App. 3). On July 17, 1997, the district court sentenced defendant to a one-year term of probation.

On December 10, 2003, defendant filed a motion to expunge all records relating to her conviction. She sought relief because of her: (1) "fear" that her criminal record would "seriously limit her ability to find employment;" (2) post-conviction accomplishments, including a college and nursing degree, promotion to Lieutenant of the Zeigler Fire Department, and current employment as a cashier supervisor at a Target store; and (3) "remorse[]" about her crime. (App. 11-13).

On January 16, 2004, the district court (Honorable J. Phil Gilbert) granted in part and denied in part defendant's motion to expunge. It ruled that because the government did not respond to defendant's motion, it had waived "any objection to it." (App. 15). The trial court ordered that its records relating to Flowers'

conviction be expunged because “the dangers of unwarranted adverse consequences” to defendant “outweigh[ed] the public interest in maintenance of the records.” *Ibid.*, (quoting *United States v. Janik*, 10 F.3d 470, 472 (7th Cir. 1993)). It reasoned that although “ordinarily, difficulty getting a job is not sufficient to warrant expungement,” “in view of [defendant’s] apparent personal rehabilitation,” and “the government’s failure to respond to [defendant’s] motion,” defendant’s “potential employment problems outweigh the public interest in maintaining her judicial records.” (App. 15-16).

The trial court concluded that Flowers’ situation could be distinguished from *Janik*. There, this Court held that a defendant’s potential employment problems were not a sufficient basis to expunge court records relating to a conviction that was overturned on appeal for a violation of the Speedy Trial Act. The district court explained that “Flowers’ crime was far less serious” than Janik’s possession of two unregistered guns since her offense did not even subject her to a term of imprisonment” and Janik received “eight months in prison and five years probation.” (App. 16).

At the same time, the district court ruled that it had no authority to expunge nonjudicial records of defendant’s conviction. Relying on *Janik*, 10 F.3d at 472, it explained that since a federal court has limited jurisdiction and has not been statutorily vested with the power to expunge records maintained by other branches of government, it has no power to expunge records of defendant’s conviction maintained by the Executive Branch. (App. 16).

On February 5, 2004, the United States filed a Motion To Stay Order And

Request For Leave To File Government's Response. (App. 18-19). The Assistant United States Attorney to whom defendant's motion to expunge had been mailed signed the pleading and stated that for unknown reasons the government had never received the motion, and only learned of it upon receipt of the district court's January 16 order. The motion requested that the district court stay implementation of its order, allow the government to respond, and then reconsider its ruling. On March 9, 2004, the district court denied the government's motion. (App. 20)².

SUMMARY OF ARGUMENT

The district court's decision, ordering that judicial records relating to defendant's conviction be expunged, is contrary to precedent of this Court and other courts of appeals. In fact, counsel's research has not revealed any appellate case law that supports the district court's decision to expunge records of an adult conviction of any kind for equitable reasons. Balancing the "public interest in the maintenance of records" against "the dangers of unwarranted adverse consequences to the defendant," the district court should have concluded that defendant was not entitled to have court records of her conviction expunged because: (1) she is guilty of the underlying crime; (2) her potential employment problems, rehabilitation, and remorse do not provide a valid basis for expunging records; (3) she failed to present any affirmative evidence to support her request; and (4) the government's failure to respond to defendant's motion was excusable and, in any event, did not

² Counsel has been advised by the clerk's office in the Southern District of Illinois, that court records are not destroyed when they are expunged. Instead, the clerk's office removes all references to the case from its computer system and places the court file in a locked vault in a basement storage room.

justify the ordered relief. *United States v. Janik*, 10 F.3d 470, 472 (7th Cir. 1993).

Accordingly, the district court abused its discretion in expunging judicial records of defendant's conviction.

ARGUMENT

THE DISTRICT COURT ERRED IN ORDERING THAT COURT RECORDS RELATING TO DEFENDANT'S CONVICTION BE EXPUNGED

It is well established that "expunction of criminal court records is an extraordinary remedy" and "granting such relief is confined to extreme circumstances." *United States v. Noonan*, 906 F.2d 952, 956-957 (3d Cir. 1990). See, e.g., *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 701 (5th Cir. 1997), cert. denied, 523 U.S. 1077 (1998); *United States v. Smith*, 940 F.2d 395, 396 (9th Cir. 1991); *United States v. Bagley*, 899 F.2d 707, 708 (8th Cir.), cert. denied, 498 U.S. 938 (1990); *United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977), cert. denied, 435 U.S. 907 (1978). That is because the government has a strong interest in retaining and preserving criminal records to ensure effective law enforcement. See *United States v. Janik*, 10 F.3d 470, 471-472 (7th Cir. 1993). Records relating to a defendant's past criminal conduct are vital tools when investigating ongoing criminal activity and essential when computing a sentence pursuant to the Federal Sentencing Guidelines. Accordingly, it is hardly surprising that courts have repeatedly warned that expungement, or "[t]he judicial editing of history" can 'produce greater harm than that sought to be corrected.'" *Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1234-1235 (10th Cir. 2001) (quoting *Rogers v. Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972)).

In *United States v. Janik* 10 F.3d at 473, this Court addressed a defendant's request to expunge all records of a weapons conviction which was overturned on appeal. As a threshold matter, this Court held that, in the absence of a specific statutory directive, a federal court lacks jurisdiction to expunge criminal records maintained by the Executive Branch, but reaffirmed that a federal court had inherent authority to expunge judicial records. This Court balanced "the public interest in the maintenance of records" against "the dangers of unwarranted adverse consequences" to the defendant and concluded that expungement of court records in that case was not warranted. *Id.* at 472. It relied on an earlier decision holding that expungement of an arrest record following an acquittal was not justified for equitable reasons "under any approach." *Scruggs v. United States*, 929 F.2d 305, 307 (7th Cir. 1991). This Court reasoned that, since the district court originally, and it, on direct appeal, found the evidence was sufficient to establish guilt, defendant's claim of potential employment problems resulting from his criminal record did not establish a basis for relief. *Janik*, 10 F.3d at 472-473.

Since this Court's precedent dictates that a defendant whose conviction has been overturned on appeal is not entitled to have court records expunged so long as there is evidence of guilt, Flowers, who pled guilty and stipulated to facts demonstrating that she engaged in a violation of 42 U.S.C. 3631(b)(1), is not entitled to have her records expunged. *Janik*, 10 F.3d at 472; *Scruggs*, 929 F.2d at 307. Indeed, our research has not revealed any court of appeals case approving

expungement of a valid, adult conviction.³

The district court erred in distinguishing *Janik* from the instant case on the ground that “Flowers’ crime was far less serious than Janik’s” because Flowers was sentenced to probation and Janik had to “serve eight months in prison and five years on probation.” First, the district court failed to cite any authority to support its conclusion that the severity of a defendant’s sentence has some bearing on the appropriateness of expungement. In any event, here, defendant’s sentence did not reflect the severity of defendant’s conduct. Rather, pursuant to the Federal Sentencing Guidelines, defendant’s sentence was a function of the fact that she had no prior record, was permitted to plead guilty to a misdemeanor, accepted responsibility for her criminal conduct, and agreed to fully cooperate with the government, including testifying against a co-defendant. In fact, had Flowers not pled guilty and agreed to testify truthfully at her co-defendant’s trial, she, like her co-defendant, could have been charged with multiple felonies and, if convicted,

³ Other courts of appeals have uniformly rejected a defendant’s request to expunge records relating to a valid conviction. See, e.g., *United States v. Pinto*, 1 F.3d 1069, 1070 (10th Cir. 1993); *Smith*, 940 F.2d 395; *United States v. Scott*, 793 F.2d 117, 118 (5th Cir. 1986). This is so even when a defendant has been pardoned for his criminal conduct. See *Noonan*, 906 F.2d at 956. Cf. *Doe v. Webster*, 606 F.2d 1226, 1231 (D.C. Cir. 1979) (ordering expungement of conviction for possession of marijuana, which was committed and set aside under the Federal Youth Corrections Act, but denying expungement of record of arrest for that offense). In fact, three courts of appeals have held that a federal court lacks jurisdiction to expunge a criminal record solely for equitable reasons when a defendant has been lawfully convicted. See *United States v. Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000); *Pinto*, 1 F.3d at 1070; *Scott*, 793 F.2d at 118. See also *Noonan*, 906 F.2d at 957 (suggesting that balancing test weighing harm to the individual against governmental interest in maintaining records may not be appropriate when a defendant, who has been pardoned, does not challenge the validity of his arrest or conviction).

sentenced to a substantial term of imprisonment far in excess of the eight months Janik received.⁴ Consequently, the district court erred in distinguishing controlling precedent and concluding that Flowers, unlike Janik, was entitled to have her court records expunged.

Moreover, this Court, as well as other courts of appeals, have uniformly rejected a defendant's request to expunge criminal records merely because they have an impact on a defendant's employment opportunities or reputation in the community. That is so, regardless of the ultimate disposition of the case – conviction, reversal on appeal, acquittal, or dismissal of charges before trial. See, *e.g.*, *Janik*, 10 F.3d at 473 (defendant's affidavit that he "was rejected for employment with the Cook County Metropolitan Sanitary District" and "fear[ed] that he will not obtain promotions in the United States Army Reserves * * * [or] civilian employment with various municipal and county employers" because of his criminal record insufficient to justify relief); *United States v. Pinto*, 1 F.3d 1069, 1070 (10th Cir. 1993) (claim that status as a felon "interfer[ed] with [defendant's] efforts to rebuild her life" including helping at her daughter's liquor store insufficient); *Allen v. Webster*, 742 F.2d 153 (4th Cir. 1984) (repeated failures to secure federal employment following acquittal insufficient); *Schnitzer*, 567 F.2d at 540 (problem caused to rabbinical student by arrest record on charges that were dismissed prior to

⁴ One of Flowers's co-defendants was convicted by a jury of a violation of 18 U.S.C. 241 (conspiracy against civil rights) and a violation of 42 U.S.C. 3631(b)(1) (interference with housing rights on account of race), and sentenced to 30 months' imprisonment and fined \$500.00. (App. 9-10). Her other co-defendant pled guilty to a misdemeanor violation of 42 U.S.C. 3631(b)(1) and was sentenced to two years' probation and fined \$1,000. (App. 7).

trial insufficient); *United States v. Linn*, 513 F.2d 925, 927 (10th Cir.), cert. denied, 423 U.S. 836 (1975) (potential impact of criminal record following acquittal on attorney's reputation insufficient). That is because expungement is appropriate only when "*unwarranted* adverse consequences to the defendant outweigh the public interest in maintenance of records," *Janik*, 10 F.3d at 472 (emphasis added), and employment problems resulting from a criminal record are not considered unjustified, extraordinary, or anything beyond "the natural and intended collateral consequences of having been convicted." *Pinto*, 1 F.3d at 1070-1071 (quoting, *Smith*, 940 F.2d at 396). See *Sealed Appellant*, 130 F.3d at 702. As the Ninth Circuit explained, if employment problems resulting from a criminal record were "sufficient to outweigh the government's interest in maintaining criminal records, expunction would no longer be the narrow, extraordinary exception, but a generally available remedy." *Smith*, 940 F.2d at 396. As a result, even when a defendant is acquitted of charges or had his conviction overturned on appeal, courts of appeals have consistently reversed district court decisions ordering expungement of criminal records based on a claim that they interfere with employment opportunities. See, e.g., *Sealed Appellant*, 130 F.3d at 702 (reversing order expunging all records of overturned conviction based on a claim that defendant "is having a hard time getting a job in law enforcement"); *United States v. Friesen*, 853 F.2d 816, 818 (10th Cir. 1988) (rejecting attorney's request that criminal record of acquittal for drug-related offense be expunged since it damaged his employment opportunities, reputation in the community, and possibly prevented professional licensing); *Rogers v. Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972) (vacating order expunging record of conviction

overturned on appeal, which required defendant to resign from the school board). See also *Smith*, 940 F.2d at 395 (reversing decision expunging record of criminal conviction that could cause disbarment and impede reenlistment in military). Accordingly, defendant here was not entitled to have judicial records of her conviction expunged.

The district court also clearly erred because defendant presented no evidence to support her request for expungement. Indeed, Flowers merely alleged that she “fears that if her records in this matter are not expunged, it will seriously limit her ability to find employment” and offered nothing to support her bald assertion. See *Sealed Appellant*, 130 F.3d at 702 (refusing to expunge criminal record in part because defendant “has not made an adequate showing of harm”); *Geary v. United States*, 901 F.2d 679, 680 (8th Cir. 1990) (explaining that district court properly denied defendant’s motion to expunge records of arrest and acquittal on bank robbery charge since defendant “marshalled no facts in support of claim[]”); *Friesen*, 853 F.2d at 818 (reversing order expunging arrest record and criticizing district court for “bas[ing] its judgment only upon the unsupported conclusions set forth in defendant’s motion”). In any event, since the district court lacks jurisdiction to expunge criminal records maintained by the Executive Branch, it seems inconceivable that defendant could establish any “unwarranted adverse consequences” from the court’s failure to expunge judicial records, let alone consequences that outweigh the public interest in maintaining the records.

Finally, the district court erred in concluding “the government’s failure to respond to Flowers’ motion” was an admission and a basis for ordering

expungement of its records. (App. 16). In fact, the government explained in its motion that it did not agree with the court's order and had not filed an opposition to defendant's motion because it learned of defendant's request only upon receipt of the court's order. Moreover, this Court has held that the "propriety of expunction cannot turn solely on the presence or absence of [a] [g]overnment opposition."

Diamond v. United States, 649 F.2d 496, 498 (7th Cir. 1981). As noted *supra*, Flowers failed to demonstrate that she was entitled to expungement. As a result, the government's failure to respond to her motion does not provide a valid basis for the court's order. Accordingly, the district court abused its discretion in ordering that judicial records of defendant's conviction be expunged.

CONCLUSION

This Court should vacate that portion of the district court's order expunging judicial records of defendant's conviction and remand the case with instructions that the district court require that the records be returned to their original state.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 2892 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE THAT DIGITAL VERSION OF THE APPENDIX
IS NOT AVAILABLE

Pursuant to Circuit Rule 31(e), I hereby certify that the appendix is not
available in a non-scanned PDF or electronic version.

LISA J. STARK

STATEMENT OF INCLUSION OF REQUIRED MATERIALS
IN APPENDIX

Pursuant to Circuit Rule 30(d), I hereby state that all of the materials required by parts (a) and (b) of Circuit Rule 30 are included in the appendix.

LISA J. STARK

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2004, two copies of the Corrected Brief Of The United States As Appellant And Required Appendix and an electronic disk containing a PDF version of the Brief were served by first-class mail, postage prepaid, on the following counsel of record. Both documents are filed under seal.

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